80-657

No. .....

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAY McCOWN; L.R.C. CORPORATION; CORPORATION COMMISSION OF STATE OF OKLAHOMA; and CLEARY PETROLEUM CORPORATION,
Petitioners,

VERSUS

DON CRAVENS, Receiver for Buffalo Valley Gas Authority, a public trust; and COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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Counsel of Record for Petitioners

October, 1980

QUESTION PRESENTED

Does OKLA. STAT., tit 52, § 87.1(a), authorizing the Oklahoma Corporation Commission to establish initial drilling and spacing units, violate the Fourteenth Amendment to the U. S. Constitution in a case where notice of the hearing is rendered only by publication, as provided in the statute, and where a producing leasehold is included in the larger proposed initial drilling and spacing unit?

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No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1980

JAY McCOWN; L.R.C. CORPORATION; CORPORATION COMMISSION OF STATE OF OKLAHOMA; and CLEARY PETROLEUM CORPORATION,
Petitioners,

VERSUS

DON CRAVENS, Receiver for Buffalo Valley Gas Authority, a public trust; and COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

The petitioners, Jay McCown and L.R.C. Corp. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Oklahoma Supreme Court entered in this proceeding on April 29, 1980; rehearing denied July 21, 1980.

OPINION BELOW

The opinion of the Oklahoma Supreme Court, reported as *Cravens* v. *Corporation Commission*, 613 P.2d 442 (Okla. 1980), appears in Appendix "A" herein.

JURISDICTION

The judgment of the Oklahoma Supreme Court was entered on April 29, 1980. A timely petition for rehearing was denied on July 21, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Oklahoma Statutes, Title 52, Section 87.1(a). Common Source of Supply of Oil — Well Spacing and Drilling Units.

See Appendix "D".

STATEMENT OF THE CASE

Petitioner, McCown, obtained Order No. 126044 in Cause CD No. 46121 from the Oklahoma Corporation Commission establishing the NW/4 of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma, as a 160-acre drilling and spacing unit for the Big Fork (Reneau Chert) common source of supply on November 23, 1976. See Appendix "C". This initial spacing order was obtained pursuant to application, notice and hearing as required under Oklahoma Statutes, to-wit:

OKLA. STAT., tit. 52, § 87.1.

The application by McCown and the order by the Commission included a producing 80-acre leasehold estate (S/2 NW/4 of Section 32) owned by Buffalo Valley Gas Authority, a public trust, hereinafter referred to as respondent.

At the time of the application the respondent trust was under the control of Don Cravens, receiver of the trust and the Industrial Bank of Memphis, Memphis, Tennessee, was the bond trustee for the respondent. The bank's indentures covered all of the assets of the respondent trust.

Petitioner, McCown, relying on the notice provisions of the Oklahoma Statutes, gave notice of the hearing on his application by publication in both Latimer and Oklahoma Counties of Oklahoma. The respondents did not appear at the spacing hearing before the Oklahoma Corporation Commission and the Commission entered Order No. 12044 establishing the NW/4 of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma as a single drilling and spacing unit for the production of gas from the Big Fork (Reneau Chert) common source of supply. The order also designated No. 1 Reneau Well located in the S/2 NW/4 of Section 32 as the unit well. The respondents acknowledged notice of the order on December 17, 1976, but took no action until July 8, 1977, when they chose to file an application in Cause CD No. 49898 seeking to vacate the prior Order No. 126044. After a hearing before a commission trial examiner and a hearing before the corporation commissioners on exceptions to the trial examiner's report, the Commission issued its Order No. 141894 denying respondent's application and leaving the prior spacing order intact. See Appendix "B". In its order denying the respondent's application, the Commission found that proper notice had been given, that there had occurred no substantial change in condition or knowledge of a condition since the prior order and that 160-acre spacing was necessary under the facts presented.

The respondents appealed the decision of the Commission to the Oklahoma Supreme Court saying that they had received no actual notice of the hearing of the petitioners' application for establishment of a drilling and spacing unit and that by virtue of the failure of notice, the due process protections guaranteed under the Fourteenth Amendment of the U. S. Constitution had been denied them. They further asserted that had they received notice they would have appeared at the hearing to dispute the necessity of the creation of such a unit encompassing their leasehold. Respondents do acknowledge, however, that notice in accordance with the statutes in Oklahoma was given by petitioners.

The Oklahoma Supreme Court held on appeal, that when an applicant seeks to establish a drilling and spacing unit which includes a producing leasehold and the applicant knows of the identity of parties owning an interest therein, or can with due diligence ascertain same, such applicant must not only give the notice required by statute but must give notice by means reasonably calculated to inform all affected parties, thus, reversed the order of the Oklahoma Corporation Commission and, in effect, vacated the 160-acre drilling and spacing unit.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE OKLAHOMA SUPREME COURT CONFLICTS WITH ITS OWN PRIOR DECISIONS AND DECISIONS OF THIS HONORABLE COURT AS TO THE SCOPE OF THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION AND AS TO THE VALIDITY AND CONSTITUTIONALITY OF OKLA. STAT., tit. 52, § 87.1.

The essence of the Oklahoma Supreme Court opinion below is that an oil and gas drilling and spacing hearing before the Corporation Commission, determines property rights protected by the constitution and as such, the notice standards of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), are applicable. As important legal effect of such a holding is to deny the constitutionality of OKLA. STAT., tit. 52, § 87.1(a) which, *inter alia*, sets out the notice requirements for drilling and spacing proceedings in Oklahoma.

1. Nature of the Interests

In Oklahoma the Corporation Commission is a constitutionally created body charged with exercising the police power of the State in the interest of conserving the State's natural resources. *Russell* v. *Walker*, 160 Okl. 145, 15 P.2d 114 (1932). Establishment of oil and gas drilling and spacing units is a function performed by the Commission aimed at insuring that sources of supply are conservatively developed and at protecting the correlative rights of all persons with interests in common sources of supply.

In the case of *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190 (1900), it was held that a state may regulate the produc-

tion of oil or gas by its police power in the interest of resource conservation without infringing upon due process interests. The Court, in arriving at such a holding, made an excellent, exhaustive and detailed outline of the nature of the interests held by mineral owners.

In *Ohio Oil*, as in the case herein, the central issue was whether the regulatory action by the state affected property which was protected by the fourteenth amendment. This issue is central because if no property right, in the fourteenth amendment sense, is held by the complaining party, then no due process protection is available. If no protected property right is infringed, there is nothing to be brought under the guaranties of the fourteenth amendment.

The Court in *Ohio Oil* concluded that the owner of mineral interests in land, under Indiana law, have no title whatever to the oil and gas underlying the land until their efforts to capture the minerals has resulted in dominion and control by actual possession. Without possession of the oil and gas, the mineral owner was without grounds to complain of due process violations by the state regulatory agency. The rule is the same in Oklahoma as shown by its application by the court in *Champlin Refining Company* v. *Corporation Commission*, 286 U.S. 210 (1932), at 233-234.

The Oklahoma Supreme Court has repeatedly held that the State may exercise its police power through the Corporation Commission. In *Land Owners Oil, Gas & Royalty Owners* v. *Corporation Commission*, 420 P.2d 542 (Okl. 1966), the court held that the Commission had authority, through exercise of its legislatively assigned police power, to establish drilling and spacing units. The court in *Land-*

owners, at 544, clearly upheld the well spacing authority of the Commission as proper under constitutional due process standards:

> "In Patterson v. Stanolind Oil & Gas Co., 182 Okl. 155, 77 P.2d 83, and Wood Oil Co. v. Corporation Commission, Okl., 268 P.2d 878, we held that regulation by the state under its police powers of the drilling of oil and gas wells into a common source of supply and the distribution of the production among owners of mineral rights in land overlying the common source of supply does not violate provisions of either State or Federal Constitutions prohibiting taking of property without due process of law.
>
> "In Oklahoma Natural Gas Company v. Long, Okl., 406 P.2d 499, we stated the following:
>
> > 'The right of the Legislature to act under the police power of the state is a part of the existing law at the time of the execution of every contract, and as such becomes in contemplation of law a part of that contract.'
>
> We also stated:
>
> > 'Well spacing is a valid exercise of the police power of the State in the interests of conservation of our natural resources, and private contractual provisions requiring the drilling of a well to tap these resources must yield where in conflict with such spacing regulations.' "

But the court below in the instant case held that the notice portion of the Oklahoma spacing statute could not withstand constitutional scrutiny citing several factors. The keystone of the opinion appears in 613 P.2d, at 444 where the court says, "We are unaware of any other proceeding so profoundly affecting personal or property rights . . .".

The sole rationale offered for such a position is that the respondent's proceeds from the sale of gas must be shared as a result of the Commission order for spacing, thus, "directly and adversely" affecting respondent's "legal rights."

Such a position is clearly contrary to prior cases decided both by the Oklahoma Supreme Court and this Honorable Court. A representative case decided by the Oklahoma court was *Patterson* v. *Stanolind Oil & Gas Company, supra, appeal dismissed* 300 U.S. 376. In *Patterson* the plaintiff was the owner of the mineral rights under the North 6¼ acres of a 10-acre drilling and spacing unit in Oklahoma. Prior to the spacing order an oil well had been successfully drilled and produced on the plaintiff's land. From the date the well was produced until the date of the spacing order, the plaintiff received 100% of the royalty. The effect of the Commission order was to reduce the plaintiff's interest to 62.5% of the total royalty. The plaintiff contended that as owner of the land upon which the well was drilled, he had the right to all of the minerals that he was able to reduce to possession thereon. He claimed that the Commission's order was not a valid exercise of the police power and that his fourteenth amendment rights to due process had been violated thereby.

As in *Ohio Oil,* supra, the court in *Patterson* first had to decide the pivotal issue, identical to the case herein, as to the *nature* of the rights sought to be protected. The issue was clearly settled on page 160 as follows:

> "Thus, in our opinion, it is well established that the police power of the state extends to protecting the correlative rights of owners in a common source of oil and gas supply and this power may be lawfully exercised

by regulating the drilling of wells into said common source of supply and distributing the production thereof among the owners of mineral rights in land overlying said common source of supply. As to the charge that such regulations deprive the individual of property without compensation or due process of law, the defendants very convincingly demonstrate that the enforcement of charter 59, art. 1, S. L. 1935, though it may reduce the plaintiff's immediate or current receipts from the production of the well in question, yet, in protecting the common source of supply from sporadic drilling, it will tend to prolong his receipts so that their total or his ultimate benefit from said pool will be greater than it would be if the number of wells drilled into the pool were not limited. However, be that as it may, since the plaintiff's mineral deed did not grant him the benefit, use, or possession of any definite amount of minerals nor the right to reduce any certain amount of minerals to possession, *but only gave him an ownership in the oil and gas that might be captured or reduced to possession, and since the right to capture from a common source of supply may be limited or restricted by the state, it may be said that such a grant can confer no right or title in property that is not already subject to being limited, restricted, or modified by the state's said power.*" (Emphasis added)

In *Patterson*, as here, the order of the Commission could not deprive any person of interests protected by the Constitution because the ownership of mineral rights allows nothing more than a limited right to recover hydrocarbons from a common source of supply. Furthermore, in both cases the Commission, using substantial evidence, determined that conservation would be best served by the regulation of production.

The Oklahoma Court in *Patterson* held, in convincing and unmistakable terms, that spacing hearings do not deal with property interests protected by either the U. S. or Oklahoma Constitutions. Its language, in strict undistinguishable disagreement with the holding on appeal herein, is also found at page 160 as follows:

> "Thus, in our opinion, the lawful exercise of the state's power to protect the correlative rights of owners in a common source of supply of oil and gas is not a proper subject for the invocation of the provisions of either the state or federal Constitution. . . . *As we view it the property hereinabove has not been taken or confiscated; its use has merely been restricted and qualified.* This does not violate the due process clause of either constitution. And this would be true even though the plaintiff were able to prove a distinct loss himself through the operation of the statutes putting said police power into force and effect." (Emphasis added)

It should be noted that in *both* the instant case and in *Patterson* the complaining party was the owner of a producing leasehold at the time of the hearing. The court in *Patterson,* contrary to the case herein, correctly made no distinction by virtue of the production since the minerals already reduced to possession were not affected by the Commission order. But in the case at bar the court, based upon a misconception of the interests involved, made a requirement of notice in those situations where a producing leasehold is within the areas sought to be spaced.

The court's inconsistency and error in applying the fourteenth amendment is clear. The foregoing conflicts justify the grant of certiorari to review the judgment below.

2. Legislative Authority

The State exercises its legislative authority in order that "the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed." *Ohio Oil Co.* v. *Indiana,* 117 U.S., at 210. There is little doubt that the *creation* of drilling and spacing units by the Oklahoma Corporation Commission is entirely a legislative function and as such the Legislature may set down its own procedure rules through which that function is effected. Adherence to the lower court's decision herein denies absolutely the legislative nature of the initial spacing hearing.

Considering another Oklahoma case, *Bridal* v. *Cottonwood Creek Conservancy District No. 11,* 405 P.2d 17 (1965) *cert. denied* 382 U.S. 943 (1965), as recently as 1965 the Oklahoma Supreme Court recognized that the creation of spacing units was fundamentally a legislative function. A comparison with other conservation statutes is made 405 P.2d, at 30:

> "Notice by publication is different from service by publication as those terms are used in our statutes, and the present Conservancy Act is not the only legislative enactment providing for proceedings affecting property rights, without requiring either personal service or service by publication. *See, for instance, the Oklahoma Oil and Gas Conservancy Act (Tit. 52 O.S. 1961, § 81 et seq.) with particular attention to the type of notice prescribed for well spacing petitions (Section 87.1 of the same title).*" (Emphasis added)

The court in *Bridal* was considering the sufficiency of notice by publication in establishing water conservancy districts.

The court in *Bridal* made it clear that the Legislature may *affect* property rights without notice to the holders of those rights and that it may also exercise such legislative authority through a board or commission. The court herein, by its holding, denies the authority of the Legislature to provide for exercise of such police power without imposing upon itself due process notice constraints. The effect of such a ruling could invalidate all legislation which does not give notice to the interested parties.

The Legislature and the Corporation Commission obviously recognize the prospective legislative nature of an initial spacing hearing by the fact that the statute and the Commission rules require more stringent notice standards in proceedings *subsequent* to the initial spacing hearing. Oklahoma Corporation Commission Rules of Practice, Rule 8(d)(3); Appendix "E" hereto. Many legislative proceedings are enacted each year that profoundly affect personal or property rights where no notice is given to interested parties. Legislative acts affecting how much tax we pay, how fast we can drive our cars and many other enactments by the Legislature are actions which affect our personal and/or property rights. Certainly the action before the Corporation Commission to establish a drilling and spacing unit is a proceeding, but such statutes are not conclusive as to whether or not it is a proceeding to which parties are entitled to be served with notice. Legislative action originates its authority through the police power of the state. Actions which originate through the police power of the state are not subjects within the due process clause of the Constitution.

If the Legislature itself established a 160-acre drilling and spacing unit encompassing a producing leasehold, this court would surely uphold such an action, notwithstanding lack of actual notice to interested parties. The Legislature has authority to establish drilling and spacing units by enactment of general law, but has seen the wisdom in delegating the authority to the Oklahoma Corporation Commission because of the geographical and geological variances across the state. There are numerous conditions which must be considered by the Commission in determining what size unit should be established. OKLA. STAT. tit. 52, § 87.1(a) also places limits upon the authority of the Commission to act. For example, a unit cannot be established exceeding a maximum of 640 acres for a gas well plus a 10 percent tolerance; any oil formation cannot be spaced more than 40 acres if less than 4,000 feet below the surface nor more than 80 acres if less than 9,990 feet. It is clear that the establishment of drilling and spacing units is not an arbitrary decision by the Corporation Commission since specific criteria is set forth in the Oklahoma statutes.

This concept of delegation was recognized in *Patterson, supra,* at 161, wherein the court stated:

> "Counsel recognized the well settled rule that the legislature may enact a law, complete within itself, the object of which is a general purpose, and, for the purpose of carrying the act into operation, may delegate to administrative agencies the power to prescribe details in connection with the administration and enforcement of said law.
>
> * * * *
>
> "Though, we believe in the principle that an act whose enforcement is trusted to any agency of the

> government should be definite and certain enough to let the agency know what the Legislature intended to provide for and how the legislative will is to be carried out in the administration and enforcement of the act, still we must also recognize that there are certain subjects of legislation in which the application of this principle is necessarily limited. In our estimation, well spacing is such a subject. We believe it would be impossible for the Legislature to lay down a definite standard by which it could be determined correctly just when and under what conditions an oil-producing area should be divided into drilling units and what size and shape the units should be."

Establishment of drilling and spacing units by the Corporation Commission is clearly legislative in nature and no notice is mandated by the Constitution as a legal prerequisite. The decision below is clearly in error in light of prior opinions and justifies the grant of certiorari to review the holding below.

3. Consequence and Scope

The far-reaching and unwarranted detriment to oil exploration, investment and production in Oklahoma provides another important reason for review of the decision below.

Were the decision left intact, millions of dollars would be unnecessarily added to the cost of finding and producing hydrocarbons by the pursuit of protection of a nonexistent right to notice of a legislative hearing. The inevitable increase in costs would originate in the necessity to search the Oklahoma land title records for each proposed drilling and spacing unit and to give notice to each mineral owner. Although the lower court's ruling is limited by the

facts of the case to a situation where there is an existing producing lease, this is really no distinction or limitation at all, since oil and gas do not become property until reduced to actual possession.

Such an addition to the already burgeoning regulatory burden on oil producers creates a substantial imposition not intended by the Legislature and not required under the Constitution.

It should be noted that most other Western oil producing states have similar notice provisions in effect for the initial hearing to establish proration or drilling and spacing units. The issue is not limited to Oklahoma. The issue is nationwide in its scope, significant in its impact.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Oklahoma Supreme Court.

Respectfully submitted,

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Counsel of Record for Petitioners

October, 1980

CERTIFICATE OF SERVICE

I hereby certfiy that three (3) copies of this Petition for Writ of Certiorari were mailed to the persons listed below on the _____ day of October, 1980, by placing same in the U. S. Mail with postage fully prepaid.

All parties required to be served have been served.

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APPENDIX A

(Filed April 29, 1980)

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

DON CRAVENS, RECEIVER FOR BUFFALO VALLEY GAS AUTHORITY, a public trust, and COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS, Appellants,	)	
v.	)	No. 52,488
CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; JAY McCOWN, L.R.C. CORP., and CLEARY PETROLEUM CORPORATION, Appellees.	)	

APPEAL FROM THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

Receiver for Buffalo Gas Authority appeals from a refusal by the Corporation Commission to vacate a drilling and spacing order on grounds receiver had no actual notice of the hearing wherein order was issued.

REVERSED

Don Ed Payne
Payne and Welch
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Swinford, Johnson & Burdick
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For Appellees,
Jay McCown and L.R.C. Corp.

[APPENDIX]

DOOLIN, J.:

Don Cravens, duly appointed receiver of the Buffalo Valley Gas Authority (Authority) made application to the Oklahoma Corporation Commission (Commission) to vacate an order establishing a 160 acre drilling and spacing unit for the Big Fork, Authority, a public trust established for the purpose of furnishing natural gas to certain towns had been in receivership for a year when Commission created the unit. At that time Authority, through the receiver, was operating the Reneau Well #1, a producing gas well located on an 80 acre lease included in the unit.

Jay McCown et al (applicants) obtained the drilling and spacing order for the Big Fork (Reneau Chert) alleged common source of supply underlying a quarter section in Latimer County Oklahoma. The order designated Authority's well as the unit well. Despite actual knowledge of Authority's lease, its operation of the producing well and the existence of the receivership in Pushmataha County, applicants did not notify receiver of the proceedings before the Commission wherein they sought to include Authority's 80 acre lease in a single 160 acre unit. Notice was by publication only. Applicants did not seek to space any other acreage in the area and the order was entered by default.

Receiver was unaware of the application or proceeding before Commission until after the order was issued. It was on this principle Receiver[1] sought to vacate the order, claiming had he received notice he would have appeared and resisted the application by presenting evidence there was no basis for creating the 160 acre unit, rather than an 80 acre unit.

After hearing the trial authority recommended Receiver's application be granted and the original order va-

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[1] Appellant Commercial and Industrial Bank of Memphis is the bond indenture trustee for Authority.

cated. Applicants filed exceptions. Commission heard the exceptions and considered the trial examiner's report but declined to accept it or to vacate the order enlarging the unit. Receiver appeals.

Oklahoma statutes and the rules of the Corporation Commission provide the minimal type of notice required for each type hearing, depending on the relief sought.

52 O.S. 1979 Supp. § 87.1 sets forth the publication notice required when a drilling and spacing order is sought. This same requirement is contained in Commsission rule 12(b) which provides:

> "Applications Relating to Units: Notice of an application to establish, change or rearrange drilling and spacing units, and an application to create a unit pursuant to 52 O.S. 1961 Sec. 287.1 et seq. shall be published one time at least fifteen days prior to the hearing in a newspaper published in Oklahoma City, Oklahoma and in a newspaper published in each county in which lands embraced in the application are located. (52 O.S. 1961 Sec. 87.1)."

It is stipulated the notice requirements of the statutes and this rule were met. Notice was published in Oklahoma County and Latimer County where the well was located. However, there was no publication in Pushmataha County where the receivership was pending. Under these facts and circumstances we do not believe the publication notice provided by the statute and rules was adequate to meet constitutional scrutiny.

It is generally held that administrative agencies may not deprive, nor may a statute empower them to deprive, a person of his constitutionally protected rights without notice and hearing.[2] A statute or administrative rule may

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[2] Southern Ry. Co. v. Commonwealth of Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260 (1933); Tulsa Classroom Teachers Association, Inc. v. State Board of Equalization, 601 P.2d 99, 102 (Okla. 1979).

not take away or infringe on rights guaranteed by the constitution. We are unaware of any other proceeding so profoundly affecting personal or property rights where notice commences with publication instead of after other avenues have been exhausted, such as service of summons or notice.

Since the case of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950) promulgated standards which must be met before notice or service by publication is effective, this court has consistently required due diligence in giving notice of a proceeding to persons whose rights could be adversely affected. In *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968), we stated due process requires this notice to be given by means reasonably calculated to inform all affected parties.

If the proceeds from the sale of the gas are ordered to be shared because of the creation of an enlarged unit comprising an additional 80 acres leased by another entity, there is no doubt Authority's legal rights will be directly and adversely affected thereby. When the names and addresses of the parties are known, or are easily ascertainable by the exercise of diligence, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process under federal or Oklahoma constitutions.[3]

When the original applicants sought the 160 acre drilling and spacing unit there were at least two wells in the area, the producing Reneau #1 operated by Authority, and an offset, found by Commission to be a dry hole. Applicants admit to knowledge of the producing well operated by Authority on the 80 acre lease included in the new unit and of the existence of the receivership in Pushmataha County and the identity of the receiver. No notice was

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[3] Also see Johnson v. McDaniel, 569 P.2d 977 (Okla. 1977); Tammie v. Rodriquez, 570 P.2d 332 (Okla. 1977).

given to Authority or Receiver under appointment in Pushmataha District Court. The order was entered without opposition as no other leasehold was involved.

Regardless of the statutory provisions for publication alone applicants were required to use due diligence in notifying receiver of their application under the principles of *Bomford* and *Mullane*.

Accordingly we hold when an applicant seeks to establish a drilling and spacing unit which includes a producing leasehold and the applicant knows of the identity of parties owning an interest therein or can with due diligence ascertain same, such applicant must not only give the notice required by statute and rule but must comply with the standards of *Bomford* and *Mullane*.

REVERSED.

ALL THE JUSTICES CONCUR.

APPENDIX B

BEFORE THE CORPORATION COMMISSION OF STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF DON CRAVENS RECEIVER FOR BUFFALO VALLEY GAS AUTHORITY, A PUBLIC TRUST, AND COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS FOR AN ORDER VACATING ORDER NO. 126044 RELATING TO THE ESTABLISHMENT OF DRILLING AND SPACING UNITS FOR THE BIG FORK (RENEAU CHERT) COMMON SOURCE OF SUPPLY PURPORTEDLY UNDERLYING THE NORTHWEST QUARTER (NW/4) OF SECTION 32, TOWNSHIP 3 NORTH, RANGE 20 EAST, LATIMER COUNTY, OKLAHOMA	CAUSE CD NO. 49898 ORDER NO. 141891

REPORT OF THE COMMISSION

This cause came on for hearing before Carl Nelson, Trial Examiner for the Corporation Commission of Oklahoma on the 9th day of December, 1977 in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commsission for the purposes of taking testimony and reporting to the Commission. That testimony was taken on said date and said cause was continued to February 23, 1978 for the purpose of taking testimony of the witnesses for the protestants, Jay McCown and L R C Corp.

At the time of all hearings, Val R. Miller, Attorney, appeared for the applicants, Commercial and Industrial Bank of Memphis and Buffalo Valley Gas Authority; Mr. Don Ed Payne, Attorney, appeared for Don Cravens, Receiver of Buffalo Valley Gas Authority; Mr. Richard K.

Goodwin, Attorney, appeared for Jay McCown and L R C Corp.; Mr. James M. Peters, Attorney, appeared for Cleary Petroleum Corporation; and Mr. Harvey Cody, Conservation Attorney, appeared for the Commission.

The Trial Examiner proceeded to hear the cause and filed his report with the Commission. Exceptions to the report of the Trial Examiner were properly filed by respondents, L R C Corp. and Jay McCown, which exceptions were heard by the Commission on May 16, 1978. The Commission has heard the exceptions and considered the report of the Trial Examiner and finds as follows:

FINDINGS

1. That this is an application of Don Cravens, Receiver of Buffalo Valley Gas Authority, a Public Trust and Commercial and Industrial Bank of Memphis for an order vacating Order No. 126044, relating to the establishment of a drilling and spacing unit for the Big Fork (Reneau Chert) Common Source of Supply, underlying the NW/4 of Section 32, T3N, R20E, Latimer County, Oklahoma.

2. That the Commission has jurisdiction over the subject matter herein and that notice has been given in all respects as required by law and the rules of the Commission.

3. That heretofore, by Order No. 126044, dated November 23, 1976, the Commission established a 160-acre drilling and spacing unit for the production of gas and gas condensate from the Big Fork (Reneau Chert) Common Source of Supply, underlying the NW/4 of Section 32, T3N, R20E, Latimer County, Oklahoma.

4. That Jay McCown, L R C Corp. and Cleary Petroleum Corporation are owners of oil and gas leasehold estates underlying the N/2 NW/4 of Section 32, T3N, R20E, Latimer County, Oklahoma. That Buffalo Valley Gas Authority is the owner of a natural gas transmission system and the oil and gas leasehold estate underlying the S/2

NW/4 of Section 32, T3N, R20E, Latimer County, Oklahoma, including the A. H. Reneau No. 1 Well, located in the SE/4 SE/4 NW/4 of said Section 32; said leasehold interest and well were acquired by assignment, dated November 27, 1973.

5. Mr. Don Cravens testified that the Buffalo Valley Gas Authority is a public trust organized and existing under and by virtue of the laws of the State of Oklahoma. Its office is located in the town of Clayton, Pushmataha County, Oklahoma. The Authority was established for the purpose of furnishing natural gas to customers in the towns of Albion, Tuskahoma and Clayton, Oklahoma. The Authority issued and sold bonds in the amount of $1,470,000 and used the funds to build a natural gas transmission system which it now owns and to purchase the oil and gas leasehold estate in and under the S/2 NW/4 Section 32, T3N, R20E, Latimer County, Oklahoma, which includes the A. H. Reneau No. 1 Well, which is located in the SE/4 SE/4 NW/4 Section 32. Commercial and Industrial Bank of Memphis is the bond indenture trustee under three bond indentures executed by Authority and Bank which were issued in connection with the sale by Authority of bonds to various bondholders in the amount of $1,470,000. Said bond indentures are recorded in Latimer County and Pushmataha County, Oklahoma, and the same mortgage and pledge all of the assets of Authority to secure the payment of the Authority's outstanding bonds. Since October 30, 1975, the Authority has been in receivership pursuant to an order of the District Court of Pushmataha County, Oklahoma, in Case No. C-73-63. Don Cravens, Receiver, has served in such capacity since June 28, 1976, through the time of the hearing.

6. Don Cravens further testified that he had no notice of the prior spacing application and first heard of the spacing order in a letter from Mr. Goodwin, dated December 17, 1976. He further testified that no request was made and no permission was obtained by Mr. McCown from the Push-

mataha County District Court. Further, he testified that the A. H. Reneau Well was drilled in 1975 with the date of first sale to customers in January, 1975.

7. Mr. Dale Bartlebough testified that the Reneau No. 1 Well was drilled to a total depth of 7,097′ and completed in the Big Fork (Reneau Chert) from the interval 2,340′ to 2,480′. That by using a porosity of 7%, a water saturation of 25%, a net pay of 140 feet, and a total production of 195,000 MMCF, and by using the test data available, he assumed the test on September 18, 1977 was a 24-hour shut-in test; that the reservoir covered no more than 80 acres, with recoverable reserves of 1,500 MMCFG. Mr. Bartlebough testified that he had opened the Allen Well, located in the SE/4 NE/4 Section 31, which had been shown to be a shut-in gas well at the prior hearing and that the well was dead and, in his opinion, was a dry hole. Applicants asserted that this was a change of condition from the date of the prior spacing order.

8. Steve Rabenaldt testified that he had studied the logs on the well and the published report of Stewart A. Hoge, a supervisor with Sinclair Oil Company, who drilled the well. He further testified that there was a gross pay of 140 feet and a net effective pay of only 56 feet. Using the factor shown in Mr. Stewart's report of a 7% porosity, a water saturation of 27% and the pressure test data available, the reservoir covered 150.66 acres.

9. Fred Buxton testified that he had reviewed all the data available to him on the A. H. Reneau Well and the surrounding wells. Mr. Buxton also reviewed the report of Stewart Hoge. He testified that according to Stewart Hoge's report, the Big Fork (Reneau Chert) Formation was a fractured limestone formation. He testified that there was not enough subsurface control or available data to determine how large of a reservoir the Big Fork (Reneau Chert) Formation was, or is. He further testified that there was not enough evidence from the engineering standpoint to

make a definite evaluation although an approximation could be made from the evidence submitted, but from an economical standpoint, a 160-acre unit was necessary. He testified that the offset Allen Well located in the SE/4 NE/4 Section 31, had been perforated in the same formation Big Fork (Reneau Chert) and certainly indicates that the Big Fork (Reneau Chert) Formation extends to that area. Mr. Buxton also testified that the A. H. Reneau Well had been squeezed when it was completed by Sinclair Oil Company and the scout ticket on the well indicates that the well was only drilled out to the depth of 2,410 feet. Mr. Buxton testified and presented Exhibit 13, a blow-up copy of the microlog on the A. H. Reneau Well, to illustrate his testimony, that there was only 34 feet of net effective primary porosity throughout the total gross pay interval from 2,340' to 2,480'. He testified that only 8 feet of the net pay, in his calculations, were above the plugback depth of 2,410'. Mr. Buxton further testified that using his 34' of net pay, a factor of 7% porosity and a factor of 27% water saturation, the volume of 2,000 MMCF and the pressure data available, the reservoir covered approximately 243 acres. Mr. Buxton further testified that there existed no change of condition and no reason to change the existing 160-acre spacing.

10. The only technical data used and available to the petroleum engineers was the test data when the well was completed in 1960 and a bottom-hole pressure test performed on September 18, 1977, a copy of which was introduced as Exhibit 8. Production data was determined by estimating that approximately 1,400 to 1,680 MMCF of gas was produced and used in the drilling of an adjoining well to the east and that 22,065 MCF of gas has been sold by Authority to its customers.

11. Jack Woosley testified that he was the Vice-President of Wyoming Oil and Gas Corporation when it purchased the A. H. Reneau Well from Sinclair Oil Company and when it was put into production and sold to the Buffalo

Valley Gas Authority. Mr. Woosley testified that there was no work done on the well to put the well into production. He further testified that there was a rotary meter at the well when he was operator of the trust. Mr. Woosley testified that he was familiar with the distribution system owned and operated by the Buffalo Valley Gas Authority and, at one time was a receiver for the Authority for the District Court of Pushmataha County and that the A. H. Reneau Well was the only well connected to the distribution system. He also testified that when the system was first constructed, there was a considerable problem with gas leaks in the system. Mr. Woosley also testified that when Wyoming Oil and Gas Corporation drilled the Allen Well offset to the west of the A. H. Reneau Well, gas was used from the Reneau Well in the drilling operations and when tested, the Allen Well had an estimated open flow potential of 2,000 MCFGPD and had a 1,200 psig. He further testified that the Allen Well had some water and that it was not surprising to him to learn that the well was dead when opened by Mr. Bartllebough. Further, he testified that no one had authorized Mr. Bartlebough to open the well, and that, in his mind, in order to produce the Allen Well, once a market was developed, it would be necessary to place a dehydrator on the well.

12. That the Findings of Fact and Conclusions of Law submitted by Mr. Val R. Miller, Attorney for the applicant; Mr. Richard K. Goodwin, Attorney for Jay McCown and L R C Corp.; and Mr. James M. Peters, Attorney for Cleary Petroleum Corporation, should be incorporated and made a part of this report.

13. That proper notice as required by law and the rules of the Commission was given in Cause CD No. 46121 which resulted in Order No. 126044.

14. The data available and used by the three petroleum engineers in this cause was available at the time of the hearing in Cause CD No. 46121.

15. That there has been no change of condition or a substantial change in knowledge of conditions existing in the area since Order No. 126044 was entered.

16. That in order to prevent economical waste, a 160-acre drilling and spacing unit is necessary.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of the State of Oklahoma that the application of Don Cravens, Receiver of Buffalo Valley Gas Authority, a Public Trust, and Commercial and Industrial Bank of Memphis for an order vacating Order No. 120044, covering the Big Fork (Reneau Chert) common source of supply underlying the NW/4 of Section 32-3N-20E, Latimer County, Oklahoma be denied.

DONE AND PERFORMED this 12 day of June, 1978.

OKLAHOMA CORPORATION COMMISSION

(s) *Rex Privett*
Chairman

(s) *Hamp Baker*
Vice-Chairman

Commissioner

ATTEST:

(s) *Ed Overholser*
Secretary

APPENDIX C

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE APPLICATION OF JAY McCOWN FOR AN ORDER ESTABLISHING PROPER DRILLING AND SPACING UNITS FOR THE BIG FORK (RENEAU CHERT) COMMON SOURCE OF SUPPLY UNDERLYING THE NORTHWEST QUARTER (NW/4) OF SECTION 32, TOWNSHIP 3 NORTH, RANGE 70 EAST, LATIMER COUNTY, OKLAHOMA	CAUSE CD NO. 46121 ORDER NO. 126044

REPORT OF THE COMMISSION

This cause came on for hearing before Pat Allen, Trial Examiner of the Oklahoma Corporation Commission in the Commission's courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, on the 5th day of November, 1976, pursuant the notice given as required by law and by the rules of the Commission, for the purpose of taking testimony and reporting to the Commission.

At the time of the hearing, Richard K. Goodwin, attorney, appeared for Jay McCown, the applicant. Mr. Harvey Cody, conservation attorney, appeared for the Commission.

The Trial Examiner has heard the cause and has filed his report recommending that the application be granted, which report and recommendation are hereby adopted and the Commission finds as follows:

FINDINGS

1. That this is an application of Jay McCown for an order establishing spacing for the production of oil and gas from the Big Fork (Reneau Chert) common source of supply underlying the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County,

Oklahoma. That at the time of the hearing applicant was asking that the Commission establish original spacing establishing the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma as a 160-acre drilling and spacing unit and that the Commission designate the A. H. Reneau Well No. 1 as the Unit well.

2. That the Commission has jurisdiction over the subject matter herein and that notice has been given as required by law and the rules of the Commission.

3. The applicant is the owner of oil and gas interests in the above-described area.

4. The testimony of the applicant was that of its geological witness, Warren Pickering, geologist, which indicated that the Big Fork (Reneau Chert) common source of supply underlying the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma would be encountered between the depths of 2,174 feet to 2,526 feet.

The witness further testified that said formation underlies all of the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20, East, Latimer County, Oklahoma and that said common source of supply could be adequately drained by establishing the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma as one 160-acre drilling and spacing unit. The witness further stated in his opinion that a well spaced on 160 acres could reasonably and adequately produce the oil and gas underlying such spacing unit without waste or interfering with correlative rights, and would protect correlative rights and result in the most hydrocarbons being produced from the spaced acreage.

5. There being no evidence to the contrary, it is the finding of the Commission in the interest of economical development in the area, and to avoid waste and protect

correlative rights, that a 160-acre drilling and spacing unit should be established for the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma for the drilling and production of oil and gas from the Big Fork (Reneau Chert) common source of supply located between the depth of 2,174 feet to 2,526 feet, with the permitted well to be located no closer than 660 feet to the unit boundary and that the A. H. Reneau No. 1 Well located in the SE/4 NE/4 is designated the unit well.

ORDER

IT IS THEREFORE ORDERED by the Corporation Commission of Oklahoma, as follows:

1. The application of Jay McCown to establish a 160-acre drilling and spacing unit for the production of oil and gas from the Big Fork (Reneau Chert) common source of supply underlying the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma, is hereby granted.

2. The 160-acre drilling and spacing unit established by this order shall be the Northwest Quarter (NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma and the permitted well shall be located anywhere within said unit not closer than 660 feet to the unit boundary.

3. A map attached hereto and marked Exhibit "A" and made a part hereof shows the outline of the area spaced herein, the size and shape of the drilling unit and the location of the permitted well for said unit.

4. The A. H. Reneau No. 1 Well located in the Southeast Quarter of the Northwest Quarter (SE/4 NW/4) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma, is hereby designated as the unit well for the unit established by this order.

5. All royalty interest within said drilling and spacing unit shall be communitized and each royalty owner within said unit shall participate in the royalty from the well drilled thereon, in relation that the acreage owned by him bears to the total acreage in the unit.

6. In the event there are divided or undivided interest within said drilling and spacing unit and the parties are unable to agree upon a plan for the development of the unit, then their rights and equity shall be adjudicated by the Corporation Commission as provided by Title 52, Oklahoma Statutes, 1971, Section 87.1(d).

DONE AND PERFORMED this 23 day of November, 1976.

OKLAHOMA CORPORATION COMMISSION

(s) *Rex Privett*
Rex Privett, Chairman

(s) *Hamp Baker*
Hamp Baker, Vice Chairman

(s) *Jan Eric Cartright*
Jan Eric Cartright, Commissioner

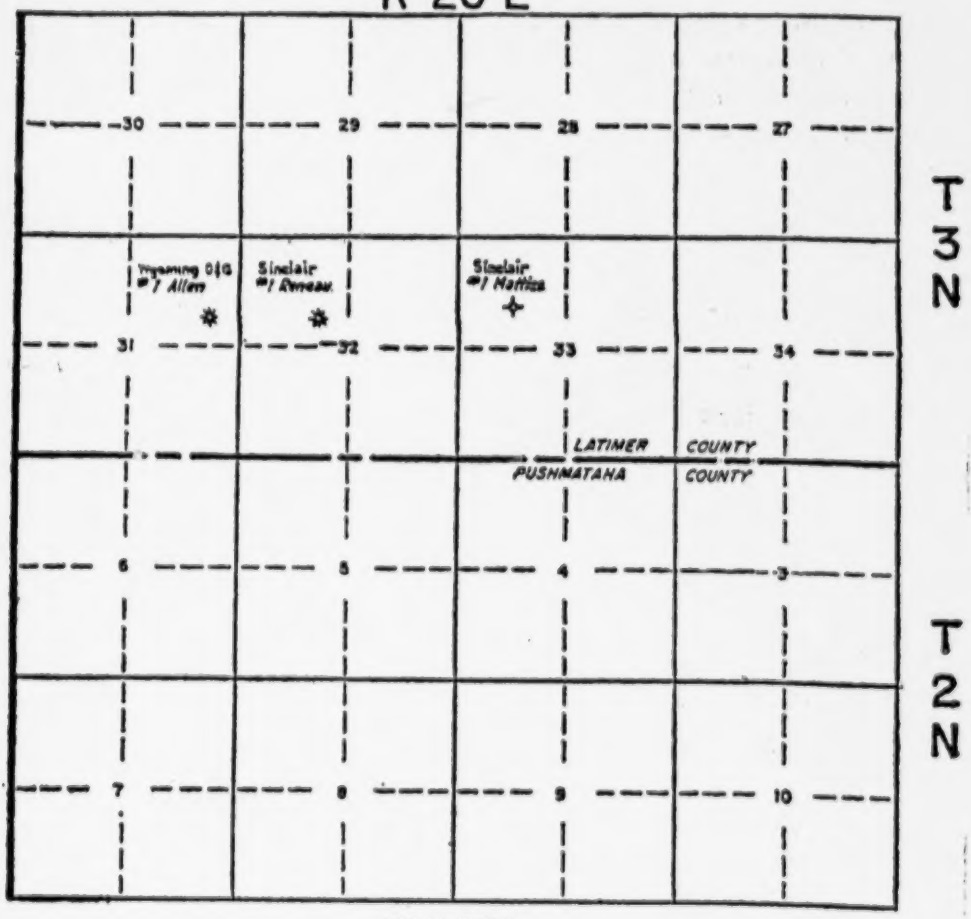
ATTEST:

(s) *Ed Overholser*
Ed Overholser, Secretary

JAY McCOWN
ESTABLISH 160-ACRE BIG FORK (RENEAU CHERT) SPACING
CAUSE C. D. 46121

LATIMER County, State of OKLAHOMA

Section 32 Township 3 NORTH Range 20 EAST



JAY McCOWN
ESTABLISH 160-ACRE BIG FORK (RENEAU CHERT) SPACING
CAUSE C. D. 46121

November 5, 1976

EXHIBIT "A" WYP

APPENDIX D

OKLAHOMA STATUTES, TITLE 52, SECTION 87.1(a)

Whenever the production from any common source of supply of oil or natural gas in this state can be obtained only under conditions constituting waste or drainage not compensated by counterdrainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this section provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma; provided, that the Commission may authorize the drilling of an additional well or wells on any spacing and drilling unit or units or any portion or portions thereof or may establish, reestablish, or reform well spacing and drilling units of different sizes and shapes when the Commission determines that a common source of supply contains predominantly oil underlying an area or areas and contains predominantly gas underlying a different area or areas; provided further that the units in the predominantly oil area or areas shall be of approximately uniform size and

shape, and the units in the predominantly gas area or areas shall be of approximately uniform size and shape, except that the units in the gas area or areas may be of non-uniform size and shape when they adjoin the units in the oil area or areas; provided further that the drilling pattern for such non-uniform units need not be uniform, and provided further that the Commission shall adjust the allowable production within said common source of supply, or any part thereof, and take such other action as may be necessary to protect the rights of interested parties. Any order issued pursuant to the provisions hereof may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen (15) days' notice of the hearing to be held upon such petition by one publication, at least fifteen (15) days prior to said hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of said hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 84 and 135, inclusive, of Title 52, Oklahoma Statutes, shall govern all proceedings and hearings provided for by this section.

APPENDIX E

OKLAHOMA CORPORATION COMMISSION RULES OF PRACTICE

Rule 8(d)(3)
APPLICATION FOR AMENDMENT OF CONSERVATION ORDERS.

At any time subsequent to the commencement and prior to the plugging and abandonment of a well upon a drilling and spacing unit, in lieu of service under subsection (b) of this rule, notice of hearing of an application to vacate, alter, modify or amend an order creating a drilling and spacing unit; to delete lands from, increase or decrease the size of the drilling and spacing unit or for increased or decreased density of wells within the unit, shall be served by the applicant by regular mail upon each person having the right to participate in production from the unit. An affidavit shall be filed prior to hearing the application, stating the names and addresses of the persons so served, and that notice has been mailed pursuant to this rule.

No. 80-657

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAY McCOWN; L.R.C. CORPORATION; CORPORATION COMMISSION OF STATE OF OKLAHOMA; and CLEARY PETROLEUM CORPORATION,
Petitioners,

VERSUS

DON CRAVENS, Receiver for Buffalo Valley Gas Authority, a public trust; and COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma

RESPONSE BRIEF OF THE ATTORNEY GENERAL OF OKLAHOMA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma
MICHAEL C. CONAWAY
Assistant Attorney General
MICHAEL L. BARDRICK
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Counsel of Record for State of Oklahoma

January, 1981

QUESTION PRESENTED

Does Oklahoma Statute Title 52 O.S. 1971, § 87.1(a), authorizing the Oklahoma Corporation Commission to establish initial drilling and spacing units, violate the Fourteenth Amendment to the United States Constitution in a case where notice of the hearing is rendered only by publication, as provided in the statute, and where a producing leasehold is included in the larger proposed initial drilling and spacing unit?

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No. 80-657

In the
Supreme Court of the United States
OCTOBER TERM, 1980

JAY McCOWN; L.R.C. CORPORATION; CORPORATION COMMISSION OF STATE OF OKLAHOMA; and CLEARY PETROLEUM CORPORATION,
Petitioners,

VERSUS

DON CRAVENS, Receiver for Buffalo Valley Gas Authority, a public trust; and COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS,
Respondents.

RESPONSE BRIEF OF THE ATTORNEY GENERAL OF OKLAHOMA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Oklahoma, Jan Eric Cartwright, respectfully prays this Court to affirm the decision rendered by the Oklahoma Supreme Court in *Cravens* v. *Corporation Commission*, Okl., 613 P.2d 442 (1980); rehearing denied July 21, 1980.

OPINION BELOW

The opinion of the Oklahoma Supreme Court, reported as *Cravens* v. *Corporation Commission*, Okl., 613 P.2d 442 (1980), appears in Appendix "A" herein.

STATEMENT OF THE CASE

On October 8, 1976, Petitioner McCown filed an Application with the Corporation Commission in Cause No. CD-46121 seeking to establish a single drilling and spacing unit for the Big Fork (Reneau Chert), an alleged common source of supply underlying the Northwest Quarter (NW¼) of Section 32, Township 3 North, Range 20 East, Latimer County, Oklahoma. The Application covered an 80-acre leasehold estate of Buffalo Valley and reference was made to a well thereon. A plat was attached to the Application showing the well to be offset by a well in Section 31 identified as the No. 1 Allen Well which was also shown to be a producer.

Although McCown was aware of the existence of Respondent Buffalo Valley and the existence of the Receiver Cravens and the receivership in Pushmataha County, Oklahoma, and knew of the Bank and its position as bond trustee, no notice of the McCown Application was given except constructive notice by publication which was run in the counties of Latimer and Oklahoma, pusuant to 52 O.S. 1971, § 87.1(a).

Respondents, having no actual notice of the McCown Application, did not appear and when the Application was heard it went by default and Order No. 126044 was entered by the Corporation Commission establishing a single drilling and spacing unit for the production of gas from the Big Fork (Reneau Chert) common source of supply and designating Buffalo Valley's well as the unit well.

On July 8, 1977, Respondents filed their Application with the Commission seeking to vacate Order No. 126044.

Actual notice of the filing of the Application was given to all interested parties. Hearing was held before a trial examiner for the Corporation Commission on December 9, 1977, and concluded on February 23, 1978.

After hearing, the trial examiner filed his report recommending to the Commission that Order No. 126044 be vacated. Exceptions were filed to the report of the trial examiner by Petitioner McCown, and the Commission, on June 12, 1978, issued its Order denying Respondents' Application to vacate Order No. 126044. The effect of this was to continue the existence of the 160-acre drilling and spacing unit created by Order No. 126044 covering the 80-acre leasehold estate of Buffalo Valley and its well.

The Respondents appealed the decision of the Corporation Commission to the Oklahoma Supreme Court stating that they had received no actual notice of the hearing of the Petitioners' application for establishment of a drilling and spacing unit and that by virtue of the failure of notice, the due process protections guaranteed under the Fourteenth Amendment of the United States Constitution had been denied them. They further asserted that had they received notice they would have appeared at the hearing to dispute the necessity of the creation of such a unit encompassing their leasehold. Respondents do acknowledge, however, that notice in accordance with the statutes in Oklahoma was given by Petitioners.

The Oklahoma Supreme Court held on appeal, that when an applicant seeks to establish a drilling and spacing unit which includes a producing leasehold and the applicant knows of the identity of parties owning an interest therein, or can with due diligence ascertain same, such ap-

plicant must not only give the notice required by statute but must give notice by means reasonably calculated to inform all affected parties, thus, reversing the order of the Oklahoma Corporation Commission and, in effect, vacating the 160-acre drilling and spacing unit.

This brief is filed in response to a letter of December 8, 1980, from Michael Rodak, Jr., directing this office to file a response in this case.

ARGUMENT

I.

TITLE 52 O.S. 1971, § 87.1(a) VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN A CASE WHERE A KNOWN AND PRODUCING LEASEHOLD IS NOT PROVIDED ACTUAL NOTICE OF A SPACING HEARING.

The leading United States Supreme Court case in this area is *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950). In the case at bar, as in *Mullane*, service was obtained by publication. In this case, constructive notice by publication is all that was given despite Petitioners' admitted knowledge of the names and addresses of the Respondents (Appendix A-2). In *Mullane*, at page 313, this Court, when talking about the meaning of the words in the Due Process Clause of the Fourteenth Amendment, said:

> ". . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Recognizing that this Court has never set down any precise rules as to when constructive notice may be used, it is understood that there are instances when it, by necessity, is appropriate. However, in *Mullane,* at page 314, this Court said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In this case, even more profoundly than in *Mullane,* the Petitioners were seeking a determination that would not only substantially affect the property rights of the Respondents in a producing gas well, by combining the producing lease of the Respondents with the non-producing lease of Petitioners, but would also decrease the revenue received by the Respondents by fifty percent (50%), which would of course, be received by Petitioners. Thus it appears that this case has a greater impact on the property rights of the Respondents than *Mullane* had on the trust beneficiaries because, even though the trusts were subject to dimunition and losing their individual identity, there was no certainty of adverse monetary loss to the beneficiaries as there is in the case at bar. Here, the Respondents' interests are reduced by fifty percent (50%).

In *Mullane,* supra, at page 318, this Court said:

> "As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits

> of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

It is the position of the Attorney General of the State of Oklahoma that this is what the Oklahoma Supreme Court held in the case at bar; requiring the Petitioners to comply with the standards of *Mullane* and those previously set out by the Oklahoma Supreme Court which will be elaborated on later in this brief. The constitutional obstacles presented Petitioners by *Mullane* are insurmountable and are even more profound in this case.

The Supreme Court of the United States has long recognized the pitfalls of something less than actual notice. In *McDonald* v. *Mabee,* 243 U.S. 90 (1917), Mr. Justice Holmes said:

> "And in states bound together by a Constitution and subject to the 14th Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.
>
> • • • •
>
> "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

It is submitted that the Oklahoma Supreme Court recognized this concept of "substantial justice" in reversing the Oklahoma Corporation Commission. In the case

at bar, notice by publication was given in the county where the Respondents' producing gas well was located, and in Oklahoma City; however, Petitioners admittedly knew that there was a receiver, Don Cravens, involved in the operation of the gas well and they also knew his address, which was not in either of the counties where publication was made (Appendix A-2). Further, no attempt was made to give actual notice to Respondent Bank of Memphis, which is out of state and thus, the insufficiency of notice by publication becomes even more profound.

In *Southern Railway Company* v. *Virginia ex rel. Shirley*, 290 U.S. 190 (1933), at page 196, this Court said:

> "The claim that the questioned statute was enacted under the police power of the State and, therefore, is not subject to the standards applicable to legislation under other powers, conflicts with the firmly established rule that *every State power is limited by the inhibitions of the Fourteenth Amendment.*" (Emphasis added.)

This negates Petitioners' argument that since the Oklahoma Corporation Commission is exercising police powers, the standards of *Mullane* do not apply. The falacious nature of this argument is further pointed out by the Oklahoma Supreme Court in the decision below, wherein it is stated that since *Mullane* and the standards promulgated thereby, the Oklahoma Supreme Court, in interpreting Oklahoma law, has set minimal standards that must be met even in cases of this nature, wherein the Corporation Commission is exercising police powers. Thus, Petitioners' arguments are inconsistent with previous Oklahoma Supreme Court decisions directly in point.

In *Milliken* v. *Meyer,* 311 U.S. 457 (1940), while analyzing the adequacy of constructive notice, it was found that adequacy was dependent upon whether or not the service substituted for actual notice was reasonably calculated to give actual notice, and thus, an opportunity to be heard. It is submitted that if any calculations were made in the instant case they must have been completely to the contrary, for the Petitioners herein knew the names and addresses of both the Respondents, receiver and out-of-state bank, yet no attempt was made to give them service personally. Furthermore, the publication that was given was not even published in either of the Respondents' places of residence.

Subsequent to *Mullane,* the Supreme Court has decided numerous cases that further expound upon the concepts laid down in *Mullane.* In *City of New York* v. *New York, New Haven and Hartford Railroad Company,* 344 U.S. 293 (1953), at page 296, this Court said:

> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best."

In *Walker* v. *City of Hutchinson, Kansas,* 352 U.S. 112 (1956), at page 116, this Court stated:

> "Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In

> the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value."

The reasoning in *Walker* parallels that of the Oklahoma Supreme Court in this case and dispels the arguments of Petitioners. In *Wisconsin Electric Power Company* v. *City of Milwaukee,* 352 U.S. 948 (1957), this Court vacated and remanded a judgment of the Supreme Court of Wisconsin, that held notice by publication was sufficient and ordered that judgment be reconsidered in the light of *Walker,* supra.

In *Schroeder* v. *City of New York,* 371 U.S. 208 (1962), in a situation with facts very similar to the case at bar, on pages 212 and 213, this Court said:

> "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question. . . ."

Thus, even though this Court has not committed itself to a formula for deciding when constructive notice may be used, there are certain minimal standards which must be met to satisfy the requirements of "substantial justice". In this case, as in *Schroeder,* there was an obligation, constitutionally imposed, to at least give a good faith attempt to notify Respondents; and here, as in *Schroeder,* it was an obligation that the mere mailing of a letter, to persons

whose names and addresses were known by Petitioners, would have discharged.

II.

THE DECISION BELOW WAS CONSISTENT WITH THE LONG-STANDING LAW IN OKLAHOMA REGARDING NOTICE BY PUBLICATION.

The Supreme Court of Oklahoma has consistently required notice by more than mere publication in situations where the person sought to be notified is within the State of Oklahoma. As early as 1935, in the case of *Ross et al.* v. *Thompson*, Okl., 50 P.2d 385 (1935), the Supreme Court of Oklahoma held that publication service is void as to:

> "[p]arties whose names and claimed interest may be ascertained from the records of the county in which the land is situate. . . . [and that] [b]efore a plaintiff may resort to service by publication on unknown owners of realty, or sue defendants by name, if living or if dead, their heirs, etc., due diligence must be exercised to ascertain whether defendants so sued are living or dead, and if dead, the names and whereabouts of their heirs." (Court Syllabus 2, 3.)

Thus, it may be said that in Oklahoma, fifteen years before the *Mullane* doctrine was announced by this Court, notice by publication alone was inadequate, absent a *diligent* search for the whereabouts of the defendant.

In the case at bar, there was "actual knowledge of the Authority's lease, its operation of the producing well and the existence of the receivership", yet notice "was by publication only." (*Cravens*, 613 P.2d at 443.)

The *Mullane* doctrine, as well as the principles of *Ross*, supra, were carried forward by the Oklahoma Supreme Court in *Bomford* v. *Socony Mobil Oil Co.*, Okl., 440 P.2d 713 (1968). The facts of *Bomford* centered around a quiet-title action concerning a mineral estate. A tax sale and tax deed were obtained contrary to the defendant's interests. Notice was effected solely by publication. After discussing *Mullane*, the Oklahoma Supreme Court stated:

> "The general rule that emerges from Mullane and subsequent cases is simple: A state cannot invest itself with, and exercise through its courts, judicial jurisdiction over a person in a proceeding which may directly and adversely affect his legally protected interests, unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard.
>
> * * * *
>
> "But notice by publication is clearly insufficient with respect to one whose name and address are known or readily ascertainable from sources at hand. In other words, the requirements of due process are not satisfied unless due dilegence has been exercised to find the whereabouts of the defendant." (*Bomford*, 440 P.2d at 718.)

The Court explained what constituted "due diligence".

> "[If a search of the] primary sources at hand, such as local tax rolls, deed records, judicial records and other official records, as well as available secondary sources, such as a telephone directory, a city directory or the like, have been exhausted in a meaningful pursuit of information, the approval of publication process as a method of notification is to be regarded with the

> same effect as a decision upon any other fact issue submitted for judicial determination." (*Bomford*, 440 P.2d at 718, 719.)

The court in *Bomford* required more than a mere assertion that "due diligence" had been exercised.

> ". . . Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise the defendant of the pendency of an action. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910. And the violation is not cured by granting the aggrieved party a hearing on his motion to set aside the tainted judgment." (*Bomford*, 440 P.2d at 719.)

In fact, the *Bomford* court admonished the trial courts in Oklahoma as follows:

> "The trial judge *shall not* approve publication process effected in any case unless he is satisfied from the evidence presented that plaintiff has met the requisite standard of due diligence." (Emphasis by the court; *Bomford*, 440 P.2d at 720.)

So it appears that in Oklahoma, where a potential defendant resides within the State, a "meaningful pursuit of information" must be made prior to any hearing that may deprive one of his legally protected interests.

In the case at bar, there is no evidence that such an inquiry was ever attempted. Only notice by publication pursuant to 52 O.S. 1971, § 87.1(a) was given. This was conceded by Petitioner McCown. (Petitioner's brief, at 3.)

A more recent Oklahoma decision with underlying facts similar to those before this Court is *Olansen* v. *Texaco*,

Inc., Okl., 587 P.2d 976 (1978). In that case, Texaco, Inc., paid royalties based on their own files of ownership of the minerals instead of the county records. A unitization proceeding was set before the Oklahoma Corporation Commission and notice was by publication pursuant to statute and Commission rule. Texaco, Inc., relied again on its own ownership files for the mailing and publication of notice.

Texaco defended its actions stating that it complied with the rules and statutes and that neither required it to serve notice on the leasor-royalty owners. However, the Oklahoma Supreme Court stated that:

> "By implication at least, the conservation statutes for compulsory unitization require some kind of actual notice (i.e., notice consistent with the due process clause) to the owner-lessor because a plan of unitization not only amends and modifies the lessor-lessee rights and duties under the oil and gas lease but may not become effective until approved or ratified by the owners of record of not less than 63% of the normal one-eighth (1/8) royalty interest." (*Olansen*, 587 P.2d at 982.)

Then the court embarked upon a discussion of *Mullane* and its requirements as to notice.

> "Under the due process clause of the United States Constitution the Olansens, whose interest and whereabouts could have been easily ascertained, were entitled to more notice than notice by publication of the unitization proceedings. In Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, the U. S. Supreme Court said that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

> is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The Court also said that the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. The Court refused to sanction notice by publication to those whose identity and addresses were ascertainable from sources readily at hand." (*Olansen,* 587 P.2d at 982.)

The Court, therefore, concluded that notice by publication, as required by statute, was insufficient to give the Olansens notice that their mineral interests had been included in a unitization proceeding. (*Olansen,* 587 P.2d at 983.)

Again, the highest Court of Oklahoma had required notice beyond the statutory requirements before mineral interests could be interfered with by the Corporation Commission.

One final Oklahoma case concerning the canceling of an oil and gas lease by publication notice, is *Johnson* v. *McDaniel,* Okl., 569 P.2d 977 (1977). Plaintiff sought to cancel a lease for non-production. Notice by publication was issued, and a summons mailed to defendant McDaniel at an Oregon address. The summons was returned unclaimed. McDaniel had an Oklahoma address and was in an Oklahoma hospital at the time "notice" was issued.

None of the sources listed in the *Bomford* case, supra, were utilized by the plaintiff Johnson. In fact, a member of the law firm representing Johnson acknowledged that

he could have located the defendant if he had checked his files. (*Johnson,* 569 P.2d at 981.)

The Oklahoma Supreme Court could find no evidence that McDaniel had any notice at all prior to the time default judgment was taken. The court stated the notice requirements to mean:

> "Where names and addresses of adverse parties are known or are easily ascertainable, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process under federal or Oklahoma constitutions. All sources must be exhausted in a meaningful pursuit of information as to a defendant's whereabouts.
>
> "The summons was returned unclaimed and no further effort was made to notify McDaniel or to obtain his address or phone from the law firm's files. The requirements of due process were not met." (*Johnson,* 569 P.2d at 981.)

The court reversed the lower court stating that a failure to comply with due process negates jurisdiction.

Thus, it has been established that the decisional law of Oklahoma requires more than statutory publication notice where, with due diligence, the defendant's address or location could be ascertained. The decision of the Oklahoma Supreme Court in the case at bar followed this forty-five year old line of authority. In the decision below, Justice Doolin, speaking for a unanimous court, reiterated:

> "When the names and addresses of the parties are known, or are easily ascertainable by the exercise of diligence, notice of pending proceedings by publication service alone, is not sufficient to satisfy the require-

ments of due process under federal or Oklahoma constitutions.

* * * *

"Regardless of the statutory provisions for publication alone applicants were required to use due diligence in notifying receiver of their application under the principles of *Bomford* and *Mullane.*" (Emphasis by court; *Cravens*, 613 P.2d at 444.)

The consistent position taken by the Oklahoma Supreme Court over the years is a sound one that seeks to insure fairness and justice. Furthermore, the State does not violate the Due Process Clause by providing alternative or additional procedures beyond what the United States Constitution requires. *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977).

It is submitted that the independent body of Oklahoma law furnishes support for the results reached in the decision below. This body of State authority, coupled with *Mullane* and the subsequent pronouncements of this Court, provide ample guidance and precedent for affirming the decision below.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be denied and the decision rendered in *Cravens* v. *Corporation Commission*, Okl., 613 P.2d 444 (April 29, 1980), should be left intact by this Honorable Court as being consistent with the United States Constitution and the interpretations thereof by this Court.

Respectfully submitted,

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January, 1981

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Response were mailed to the persons listed below on the _____ day of January, 1981, by placing same in the U. S. Mail with postage fully prepaid.

All parties required to be served have been served.

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APPENDIX A

[Filed April 29, 1980]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

DON CRAVENS, RECEIVER FOR BUFFALO VALLEY GAS AUTHORITY, a public trust, and COMMERCIAL AND INDUSTRIAL BANK OF MEMPHIS, Appellants,	)	
v.	)	No. 52,488
CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; JAY McCOWN, L.R.C. CORP., and CLEARY PETROLEUM CORPORATION, Appellees.	)	

APPEAL FROM THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

Receiver for Buffalo Gas Authority appeals from a refusal by the Corporation Commission to vacate a drilling and spacing order on grounds receiver had no actual notice of the hearing wherein order was issued.

REVERSED

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[APPENDIX]

DOOLIN, J.:

Don Cravens, duly appointed receiver of the Buffalo Valley Gas Authority (Authority) made application to the Oklahoma Corporation Commission (Commission) to vacate an order establishing a 160 acre drilling and spacing unit for the Big Fork, Authority, a public trust established for the purpose of furnishing natural gas to certain towns had been in receivership for a year when Commission created the unit. At that time Authority, through the receiver, was operating the Reneau Well #1, a producing gas well located on an 80 acre lease included in the unit.

Jay McCown et al (applicants) obtained the drilling and spacing order for the Big Fork (Reneau Chert) alleged common source of supply underlying a quarter section in Latimer County Oklahoma. The order designated Authority's well as the unit well. Despite actual knowledge of Authority's lease, its operation of the producing well and the existence of the receivership in Pushmataha County, applicants did not notify receiver of the proceedings before the Commission wherein they sought to include Authority's 80 acre lease in a single 160 acre unit. Notice was by publication only. Applicants did not seek to space any other acreage in the area and the order was entered by default.

Receiver was unaware of the application or proceeding before Commission until after the order was issued. It was on this principle Receiver[1] sought to vacate the order, claiming had he received notice he would have appeared and resisted the application by presenting evidence there was no basis for creating the 160 acre unit, rather than an 80 acre unit.

After hearing the trial authority recommended Receiver's application be granted and the original order vacated. Applicants filed exceptions. Commission heard the

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[1] Appellant Commercial and Industrial Bank of Memphis is the bond indenture trustee for Authority.

exceptions and considered the trial examiner's report but declined to accept it or to vacate the order enlarging the unit. Receiver appeals.

Oklahoma statutes and the rules of the Corporation Commission provide the minimal type of notice required for each type hearing, depending on the relief sought.

52 O.S. 1979 Supp. § 87.1 sets forth the publication notice required when a drilling and spacing order is sought. This same requirement is contained in Commission rule 12(b) which provides:

> "Application Relating to Units: Notice of an application to establish, change or rearrange drilling and spacing units, and an application to create a unit pursuant to 52 O.S. 1961 Sec. 287.1 et seq. shall be published one time at least fifteen days prior to the hearing in a newspaper published in Oklahoma City, Oklahoma and in a newspaper published in each county in which lands embraced in the application are located. (52 O.S. 1961 Sec. 87.1)."

It is stipulated the notice requirements of the statutes and this rule were met. Notice was published in Oklahoma County and Latimer County where the well was located. However, there was no publication in Pushmataha County where the receivership was pending. Under these facts and circumstances we do not believe the publication notice provided by the statute and rules was adequate to meet constitutional scrutiny.

It is generally held that administrative agencies may not deprive, nor may a statute empower them to deprive, a person of his constitutionally protected rights without notice and hearing.[2] A statute or administrative rule may

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[2] Southern Ry. Co. v. Commonwealth of Virginia, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260 (1933); Tulsa Classroom Teachers Association, Inc. v. State Board of Equalization, 601 P.2d 99, 102 (Okla. 1979).

not take away or infringe on rights guaranteed by the constitution. We are unaware of any other proceeding so profoundly affecting personal or property rights where notice commences with publication instead of after other avenues have been exhausted, such as service of summons or notice.

Since the case of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950) promulgated standards which must be met before notice or service by publication is effective, this court had consistently required due diligence in giving notice of a proceeding to persons whose rights could be adversely affected. In *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968), we stated due process requires this notice to be given by means reasonably calculated to inform all affected parties.

If the proceeds from the sale of gas are ordered to be shared because of the creation of an enlarged unit comprising an additional 80 acres leased by another entity, there is no doubt Authority's legal rights will be directly and adversely affected thereby. When the names and addresses of the parties are known, or are easily ascertainable by the exercise of diligence, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process under federal or Oklahoma constitutions.[3]

When the original applicants sought the 160 acre drilling and spacing unit there were at least two wells in the area, the producing Reneau #1 operated by Authority, and an offset, found by Commission to be a dry hole. Applicants admit to knowledge of the producing well operated by Authority on the 80 acre lease included in the new unit and of the existence of the receivership in Pushmataha County and the identity of the receiver. No notice was

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[3] Also see Johnson v. McDaniel, 569 P.2d 977 (Okla. 1977); Tammie v. Rodriquez, 570 P.2d 332 (Okla. 1977).

given to Authority or Receiver under appointment in Pushmataha District Court. The order was entered without opposition as no other leasehold was involved.

Regardless of the statutory provisions for publication alone applicants were required to use due diligence in notifying receiver of their application under the principles of *Bomford* and *Mullane*.

Accordingly we hold when an applicant seeks to establish a drilling and spacing unit which includes a producing leasehold and the applicant knows of the identity of parties owning an interest therein or can with due diligence ascertain same, such applicant must not only give the notice required by statute and rule but must comply with the standards of *Bomford* and *Mullane*.

REVERSED.

ALL THE JUSTICES CONCUR.